86-854

No. _____

IN THE

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

JEOFFREY ALLAN MEACHAM and
DENNIS FRANKLIN LOZON,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DEBUS, BRADFORD & KAZAN, LTD.
By: Lawrence I. Kazan
335 East Palm Lane
Phoenix, Arizona 85004
(602) 257-8900

Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

1. WHETHER OR NOT THE GOVERNMENT IMPROPERLY VOUCHES FOR THE CREDIBILITY OF ITS KEY WITNESSES WHEN ON DIRECT EXAMINATION IT INTRODUCES INTO EVIDENCE PLEA AGREEMENTS CONTAINING THE WITNESSES' PROMISES TO TESTIFY TRUTHFULLY.

PARTIES INVOLVED

The caption of the case before this Court contains the names of all parties to the proceeding whose judgment is sought to be reviewed.

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INTRODUCTION

This Petition for Writ of Certiorari is a joint petition filed on behalf of Jeoffrey Allan Meacham and Dennis Franklin Lozon. Meacham and Lozon were tried jointly and convicted and their appeals were consolidated before the United States Court of Appeals for the Fourth Circuit. The facts and legal issue presented below apply equally to Meacham and Lozon and a joint Petition for Writ of Certiorari is the most expeditious manner in which to present this case to this Court.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported and appears in Appendix "A" attached hereto. The District Court issued no written opinion.

JURISDICTION

The opinion of the Court of Appeals was issued on August 29, 1986. Judgment was entered on August 29, 1986. (See Appendix "B"). The jurisdiction of the Supreme Court to review this case on Petition for Writ of Cetiorari is invoked pursuant to 28 U.S.C. §1254(1). This petition has been timely filed pursuant to Rule 28.2 of this Court within sixty days after entry of judgment.

STATEMENT OF THE CASE

1. District Court and Appellate Court Proceedings.

On September 28, 1983, an Indictment was filed charging Petitioner Jeoffrey Allan Meacham, and Petitioner Dennis Franklin Lozon with violation of 21 U.S.C. §846, conspiracy to distribute and possess with the intent to distribute a Schedule II narcotic drug. (CR:1).[1]

On March 3, 1983, a jury returned verdicts of guilty as to each defendant.

On May 1, 1984, the trial court ordered Meacham and Lozon to serve seven years imprisonment.

On August 29, 1986, Meacham and Lozon's convictions were affirmed by the United States Court of Appeals for the Fourth Circuit.

A timely Petition for Rehearing was filed. On September 26, 1986, the Petition for Rehearing was denied. (See Appendix "C").

2. Statement of Facts.

The conspiracy charge in this case spans the time frame beginning October, 1979 until July 1980, and encompassed the states of Maryland, Utah, Illinois and Arizona. (CR:1). The Government realized that because of the lack of corroborative evidence, guilt or innocence at trial would depend upon the credibility of the Government and defense witnesses.

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[1] Hereinafter the Clerk's Record will be referred to as "CR".

Prior to trial, the Government entered into plea bargain agreements with each of the co-conspirators and inserted into these agreements a provision that each of the co-conspirators testify truthfully at trial.

Each of the Government witnesses testified that they played a different role with respect to a conspiracy to possess with the intent to distribute and distribute a narcotic drug along with Jeoffrey Meacham and Dennis Lozon.

On the other hand, the defense case at trial evidenced that the co-conspirators merely entered into a legitimate business enterprise with Meacham and Lozon that had absolutely nothing to do with illegal drugs.

During trial, the Government in an attempt to enhance its witnesses' credibility, introduced into evidence during its case-in-chief, over defense objection, the plea agreements it had entered into with the alleged co-conspirators.

It must be remembered, that these plea agreements which called for the witnesses' truthful testimony were drafted well in advance of trial. The Government offered to introduce these agreements as exhibits during direct examination of these witnesses even though their credibility had not yet been attacked by the defense. Interestingly enough, the question arises, what is the purpose of introducing the testify truthful provision of the plea agreements into evidence when the witnesses had already been sworn under oath to testify truthfully. The only answer to this question is that the Government wanted to place its weight and authority behind the testimony of its witnesses. In effect, the Government vouched for their credibility by using this provision in the plea agreements that were Government created documents intended for trial use. Admission of these documents allowed the Government to convey the unspoken message that the prosecutor knew the truth and was assuring its revelation.

Meacham and Lozon objected to admission of the portion of the agreements that called for the witnesses to testify truthfully and argued that this provision in the plea agreement

improperly bolstered those witnesses' credibility and placed the authority of the United States Attorney's Office behind their testimony.

Nevertheless, the Court allowed admission of the entirety of the agreements into evidence, even though the witnesses' credibility had not yet been attacked.

REASONS FOR GRANTING THE WRIT

Meacham and Lozon contend that the writ should be granted for the reason that the decision of the Court of Appeals for the Fourth Circuit is in conflict with decisions of Court of Appeals for other circuits.

Rule 17(1)(a) of the Rules of the Supreme Court provides in pertinent part:

> "A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal Court of Appeals has rendered a decision in conflict with the decision of another federal Court of Appeals on the same matter; . . ."

While the language in this rule is clearly not controlling, it at least points to the types of situations under which this Court will consider the granting of certiorari.

The issue presented in the case at bar is of the nature that will continue to arise in criminal prosecutions throughout the United States of America. Specifically, as a result of the Government's attempts to ferret out criminal activity, plea agreements are entered into with confederates of those alleged to have perpetrated the criminal acts. Pursuant to these agreements, the confederate is normally required to testify against his confidents should the matter proceed to trial.

The Government clearly has an interest in requiring the bargained for witness to tell the truth in any subsequent procedding and wants a way to vitiate an agreement should the witness be untruthful. Therefore, the type of agreement

utilized in the present case and admitted into evidence in its entirety during the present trial will be a factual situation that arises again and again. In fact, a number of decisions in various circuits have specifically addressed this same issue with some circuits reaching results different from one another.

In the present case, the Fourth Circuit summarily disposed of this issue by relying on their decision in **United States vs Henderson,** 717 F.2d 135 (4th Cir. 1983), cert. denied 465 U.S. 1009 (1984). In **Henderson**, the Fourth Circuit held that a plea agreement containing a promise to testify truthfully was admissible in its entirety even where a defendant has not expressed an intention to use the agreement as a basis for impeaching the Government's witness.

In **United States v. Roberts**, 618 F.2d 530 (9th Cir. 1980), the Court of Appeals addressed this very issue and reached a contrary result. In th. . case, the key Government witness, John Adamson, entered into a plea agreement whereby he agreed to testify truthfully and completely at tall times. In finding Adamson's promise to testify truthfully should have been excised before the exhibit was admitted, the Court stated:

> "A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.
>
> Conveying this message explicitly is improper vouching. **Lawn v. United States,** 355 U.S. 399, 359-60 n. 15, 78 S. Ct. 311, 323 n. 15, 2 L.Ed. 2d 321 (1958), . . . we conclude that conveying it by implication is equally improper." 618 F. 2d at 536.

The Ninth Circuit Court of Appeals affirmed its view of the use of this type of evidence recently in **United States v. Brown,** 720 F.2d 1059 (9th Cir. 1983). The First Circuit Court of Appeals appears to take the same position as the Ninth Circuit, although it held that admitting the promise of truthfulness was not plain error in **United States v. Miceli,** 446 F.2d (1st

Cir. 1971). The Second Circuit Court of Appeals had held that the bolstering portions of a plea agreement are not admissible on direct examination in **United States v. Edwards,** 631 F.2d 1049 (2nd Cir. 1980). The Third Circuit Court of Appeals has not yet addressed this issue, however it was paid lip service in **United States v. Beaty,** 722 F.2d 1090 (3rd Cir. 1983). There, the Court found that even if the admission of a promise of truthfulness on direct examination was error, it would not constitute reversible error in the case before it.

A contrary view of this issue was taken by the Seventh Circuit Court of Appeals in **United States vs. Creamer,** 555 F.2d 612 (7th Cir. 1977). The Eleventh Circuit Court of Appeals in **United States v. Simms,** 719 F.2d 375 (11th Cir. 1983), found no reversible error with respect to a similar issue.

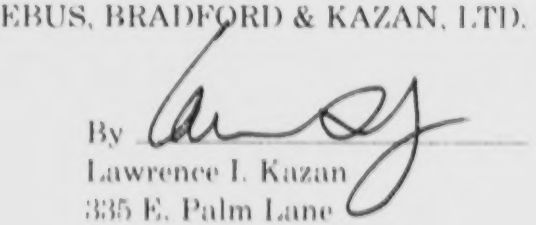
It is apparent from the foregoing, that the various Courts of Appeals take different views as to the effect of the introduction into evidence of a plea agreement promise to be truthful. This issue is one of great public importance in that it undoubtedly will arise in the vast majority of criminal cases prosecuted in United States District Courts. As a result of the split of authority with respect to this issue, clarification from this Court would undoubtedly be important.

CONCLUSION

WHEREFORE, it is respectfully requested that a Writ of Certiorari issue as to Meacham and Lozon and that the relief requested herein be granted.

RESPECTFULLY SUBMITTED this 24th day of November, 1986.

DEBUS, BRADFORD & KAZAN, LTD.



By _____
Lawrence I. Kazan
335 E. Palm Lane
Phoenix, Arizona 85004
Attorneys for PETITIONERS
MEACHAM and LOZON

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-5159(L)

United States of America,

Appellee,

versus

Jeoffrey Allen Meacham,

Appellant.

No. 84-5160

United States of America,

Appellee,

versus

Dennis Franklin Lozon,
a/k/a Denny Meacham,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (CR R-83-00394)

Argued: May 5, 1986 Decided: August 29, 1986

Before WINTER, Chief Judge, and RUSSELL and PHILLIPS, Circuit Judges.

Lawrence I. Kazan (Larry L. Debus; Debus, Bradford & Kazan, Ltd. on brief) for Appellant Jeoffrey Allen Meacham; (Tom Henze; Henze, Ronan & Clark on brief) for Appellant Dennis Franklin Lozon; John G. Douglass, Assistant United States Attorney (Breckinridge L. Willcox, United States Attorney on brief) for Appellee.

PER CURIAM:

Defendants Meacham and Lozon appeal their conviction for conspiracy to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. Finding no reversible error in the proceedings in the district court, we affirm.

I.

The government's evidence showed a conspiracy, involving Meacham, Lozon and several others, to transport cocaine and large sums of cash between Baltimore, Chicago, Salt Lake City, and Arizona. The defense attempted to show that the alleged conspirators actually delivered and accepted the cash as part of legitimate business and investment activities. The defendants admitted to using small amounts of cocaine for personal consumption. Certain members of the alleged conspiracy testified for the government at trial, pursuant to their plea agreements. the agreements, which contained promises by the witnesses to testify truthfully and completely, were admitted into evidence in their entirety, and were commented on by government counsel during the rebuttal portion of closing argument. Defendants made timely objections to the admission the portions of the plea agreement containing promises of truthful and complete testimony.

In response to questioning by his attorney, Meacham testified about his former activities as a government informant in drug cases, in an apparent effort to portray himself as a person opposed to drugs and uninvolved in drug trafficking. The government, on cross-examination, further pursued the topic of Meacham's activities as an informant.

Mr. Jordan, a DEA agent called by the government as a rebuttal witness, testified that Meacham had at one time assisted him as an informant in drug-related cases. Jordan also testified that in his 20 years as a narcotics agent he had never encountered a cooperating individual who, like Meacham, actually arranged drug transactions, who was not also a drug user or dealer. Mr. Boykevich, another DEA agent and government witness, in answering a question posed by

defense counsel, made a passing reference to investigation of Meacham by agents in Phoenix. Defendants raised timely objections to all of this government testimony, arguing that it was impermissible evidence of Meacham's "other crimes, wrongs or acts" tending to show a propensity to commit the crime charged.[1]

As the conclusion of the evidence the defense requested a jury instruction permitting conviction of the "lesser included offense" of simple possession of cocaine. The request was refused.

The jury returned guilty verdicts against both defendants.

II.

A. Government's Use of Plea Agreements

Defendants' contention that the district court erred by admitting in their entirety the plea agreements of government witnesses fails under the controlling authority of United States v. Henderson, 717 F.2d 135 (4 Cir. 1983) **cert. denied,** 465 U.S. 1009 (1984). In **Henderson**, we held that a plea agreement containing a promise to testify truthfully was admissible in its entirety even where a defendant has not expressed an intention to use the agreement as a basis for impeaching the government's witness. In the instant case, where such an intention was unmistakable and the defense made extensive use of the plea agreements in cross-examining of the cooperating government witnesses, the case for admissibility is even more compelling. **See also** United States v. McEachern, 675 F.2d 618, 624-26 (4 Cir. 1982). We therefore reject defendants' argument that by admitting the plea agreements in their entirety the district court permitted the government improperly to bolster the credibility of its witnesses.

Defendants also argue that the government's reference to the plea agreements during its rebuttal to defendants' closing

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[1] Defendants contend that Lozon too was prejudiced by the effect of the evidence of Meacham's bad acts. They therefore urge that Lozon's conviction also be reversed on this basis.

arguments constituted further improper bolstering of witness credibility, and was prejudicial, requiring reversal. **Henderson** itself lends some support to this argument, suggesting that reversal could be required if a prosecutor during closing argument "disproportionately emphasized or repeated" or otherwise "made improper use of the plea bargain promise of truthfulness." **Id.** at 138. (citing United States v. Halbert, 640 F.2d 1000, 1005 (9 Cir. 1981). We do not view as improper the prosecutor's closing argument reference to the plea bargain promise of truthfulness in this case, since it was in response to defense counsel's use of the plea bargains, during their closing argument, to attack the credibility of the cooperating government witnesses. **See Halbert,** 640 F.2d at 1006.

We therefore find no abuse of discretion in the district court's permitting the government to use these plea agreements as it did.

B. Evidence of Meacham's "Other Crimes, Wrongs, or Acts"

1. Meacham's Cross-Examination

Defendants' contention, that the government's cross-examination inquiry into meacham's conduct as a government informant in drug cases was improper, is meritless. Meacham's testimony on direct examination acknowledged limited involvement as an informant and suggested that Meacham's status as a "fanatic anti-drug individual" was the reason for this involvement. The government's cross-examination sought to discredit this testimony by revealing the true extent of Meacham's informant activities and by suggesting that monetary reward, rather than anti-drug fanaticism, was his true motivation. It was thus a permissible attempt to attack the credibility of Meacham's testimony. In addition, Meacham's testimony on direct examination tended to portray him as possessing character traits inconsistent with his being quilty of the crime charged; in this way too it opened the door for the government's attack on cross-examination. **See** Fed. R. Evid. 404(a)(1).

2. Agent Jordan's Testimony

The testimony of DEA agent Jordan served further to rebut the good character evidence profered by Meacham. Jordan, who had worked with Meacham in his informant's role, expressed the opinion that an informant of Meacham's stature wa extremely likely to have been involved in drug use and/or trafficking. This testimony helped to contradict Meacham's portrayal of himself as a "fanatic anti-drug individual." **See** Fed. R. Evid. 404 (a)(1) & 405 (a). We therefore perceive no merit in defendants' contention that Jordan's testimony, coupled with Meacham's own cross-examination testimony, constituted evidence of other crimes, wrongs, or acts and was a such inadmissible under Fed. R. Evid. 404.[2]

3. Agent Boykevich's Testimony

Defendants next contend that they were prejudiced by certain testimony of DEA agent Boykevich. We disagree.

At one point, Boykevich testified that he was the agent in charge of the investigation in this case, and that he had agents in various parts of the United States working for and with him on the investigation. Later he was asked by defense counsel whether "he or other government agents acting at (his) request" had been able to obtain telephone records from

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[2] An alternative basis for admission of this evidence is Fed. R. Evid. 404(b), which would permit this testimony as "evidence of other crimes, wrongs, or acts" tending to show intent or knowledge. **See** United States v. DiZenzo, 500 F.2d 263, 265 (4 Cir. 1974); United States v. Bice-Bey, 701 F.2d 1086, 1089 (4 Cir. 1983). Because the defense was based on the notion that the transactions in question, involving large amounts of cash, were in reality innocent business and investment activities, evidence tending to show the defendants substantial knowledge of drug sources and the like would be admissible under Rule 404 (b). As the district judge stated, in the context of the relevance of Meacham's cross-examination testimony:

> I have not one doubt in the world that, where two men are accused of having been in a conspiracy to distribute cocaine, that, for the government to demonstrate and (sic) eminent knowledge of cocaine sources in past years is utterly and completely relevant.

Arizona relating to defendants during the years 1979 and 1980. He replied he did not know for certain, but that agents in Phoenix might have such records because "they are investigating Mr. Meacham." Defendants argue that this answer was unresponsive, and that it conveyed the impression that Meacham was the subject of another drug investigation in Arizona, causing the jury to suspect him of being guilty of other drug-related crimes. This, they contend, together with the other challenged bad character evidence denied them a fair trial. However, Boykevich's testimoney when viewed as a whole is not as damaging as defendants contend. The answer challenged by defendants was, as the district court noted, fairly responsive to defense counsel's question. It can readily be interpreted as referring to out-of-state agents working with Boykevich on the investigation relating to the instant case. We agree with the district judge that the witness' response was not prejudicial, and we think that he properly refused to grant defendants' motion for mistrial on this basis.

4. Government's Comments During Closing Argument

Finally, defendants argue that they were prejudiced by the government's references during closing argument to the challenged "other crimes" evidence. The prosecutor, for example, argued to the jury that, contrary to the tenor of Meacham's testimony on direct examination, he had been "immersed in the drug world." In light of our holding that evidence tending to show Meacham's past involvement with drugs was correctly admitted, we think that the prosecutor's comments were proper, as they simply suggested a permissible inference to be drawn from that evidence. We find no error in the district court's overruling defense objections to these comments.

C. Possession as a Lesser Included Offense

We find no merit in defendants' contention that, because the testimony showed that they had possessed small amounts of cocaine for personal use, the district judge should have

instructed the jury that it could find them guilty of the "lesser included offense" of simple possession of cocaine. Defendants argue that the lesser-included-offense instruction should have been given in order that the jury, had it believed defendants' version of the facts and found that there was no conspiracy, could convict them instead of the offense of simple possession of cocaine.

We reject defendants' argument for the very simple reason that the crime of possession is not a lesser offense included within the crime for which defendants were indicted, conspiracy to distribute and to possess with the intent to distribute cocaine. **See** 21 U.S.C. § 846. As the district court noted, possession is not a necessary element of the conspiracy charged; therefore it cannot be a lesser included offense. United States v. Swingler, 758 F.2d 477, 499 (10 Cir. 1983); United States v. Brown, 604 F.2d 557, 560-61 (8 Cir. 1979).[3] Therefore, requiring the jury instruction requested by defendants would have the detrimental effect of subjecting them to an element of jeopardy — a possible conviction for the separate and uncharged offense of simple possession — to which they would not otherwise be exposed. This we decline to do.

AFFIRMED

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[3] Defendants' reliance on United States v. Levy, 703 F.2d 791 (4 Cir. 1983) is misplaced. **Levy** held that a jury instruction on the lesser included offense of possession of cocaine should have been granted. The crime charged in Levy, however, was possession with intent to distribute; simple possession is obviously a necessary element of that crime and therefore was properly defined as a lesser included offense.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

August 29, 1986

TO: Larry L. Debus
Lawrence I. Kazan
James H. Kemper
John G. Douglass

NOTICE OF JUDGEMENT

Judgement was entered in Case No. 84-5159/84-5160 this date. The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time. A petition must be *received in the Clerk's Office* within 14 days after the judgement date set forth above. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose. A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occured after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

Statement of Counsel. ***A petition shall contain an introduction stating that, in cousel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to cousel without filing.***

Form. The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time. A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time. The mandate is issued 21 days after judgment. A *timely* petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay. A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
CLERK

APPENDIX C

(Letterhead of)
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

September 26, 1986

Larry L. Debus, Esq.
Lawrence I. Kazan, Esq.
141 E. Palm Lane
Phoenix, AZ 85004

John D. Douglass, Esq.
Asst. U.S. Attorney
8th fl., U.S. Courthouse
101 W. Lombard Street
Baltimore, MD 21201

James Hamilton Kemper, Esq.
45 West Jefferson, 11th Fl.
Phoenix, AZ 85003

Re: 84-5159, 84-5160, USA v. Jeoffrey Allen Meacham, et al

Dear Counsel:

Enclosed is a copy of an order filed September 26, 1986, denying appellants' petition for rehearing in this case.

Sincerely,

JOHN M. GREACHEN

/s/ Deborah S. Holmes

By: Deborah A. Davenport
Deputy Clerk

DAD: gac
Enclosure

No. 86-854

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEOFFREY ALLEN MEACHAM AND
DENNIS FRANKLIN LOZON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the provisions in the guilty plea agreements of three government witnesses requiring them to testify truthfully at trial were properly admitted during the direct examination of the witnesses.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-854

JEOFFREY ALLEN MEACHAM AND
DENNIS FRANKLIN LOZON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. la-7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1986. A petition for rehearing was denied on September 26, 1986. The petition for a writ of certiorari was filed on November 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners were convicted of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846. Both petitioners were sentenced to seven

years' imprisonment. The court of appeals affirmed (Pet. App. la-7a).

At trial, the government established that petitioners supplied cocaine in a series of transactions to two unindicted co-conspirators, Terrence and Ronald Levee, for distribution in the Baltimore area. A third unindicted co-conspirator acted as a representative of and courier for the Levees in some of the transactions. On several occasions, the parties met in Chicago, Salt Lake City, and Phoenix to exchange cocaine for cash payments. Pet. App. 2a; Gov't C.A. Br. 1-2.

Pursuant to plea agreements with the government, the three unindicted co-conspirators testified at trial about their respective roles in the transactions. On direct examination, the government asked each of the three witnesses about his plea agreement, including the provision requiring each to testify fully and truthfully at trials in which his testimony was relevant. Following the government's examination of each witness, the government offered the plea agreements into evidence. The district court admitted the agreements over petitioners' objections. Petitioners' counsel cross-examined each witness extensively about the possibility that the government might treat him more favorably because he had agreed to cooperate. Petitioners' primary defense at trial was that the Levees were merely lending them sums to aid a failing business. Pet. App. 2a; C.A. App. 81.

ARGUMENT

Petitioners contend (Pet. 3-4) that the government's introduction of the "truthful testimony" provisions of the plea agreements constituted improper vouching for the credibility of the three cooperating witnesses. The court of appeals correctly rejected petitioners' claim, and further review by this Court is not warranted.

1. The government engages in improper vouching when it places its prestige behind a witness through personal assurances of the witness's veracity, or when the government suggests that matters outside the record support the witness's testimony. See *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958). Contrary to petitioners' contention (Pet. 3), the government's introduction of a witness's promise to tell the truth contained in a plea agreement does not constitute improper vouching, because that promise is no different from the promise made by any witness when he is sworn to testify at trial. The purpose of introducing the "truthful testimony" provision of a plea agreement is not to vouch for the witness, but merely to refute the appearance that the cooperating witness is biased in favor of the government as a result of the benefits conferred in the plea bargain. For this reason, the courts of appeals uniformly agree that the government may introduce the terms of a guilty plea or immunity agreement, including the requirement that the witness testify truthfully, for purposes of rehabilitation after the defense challenges the credibility of a government witness who is testifying pursuant to such an agreement.[1] As the court of appeals held, the district court in this case properly admitted the truthful testimony portion of the plea agreements on direct examination, because it was "unmistakab[ly]" clear at that point that petitioners'

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[1]See *United States* v. *McNeill*, 728 F.2d 5, 14 (lst Cir. 1984); *United States* v. *Smith*, 778 F.2d 925, 928 (2d Cir. 1986); *United States* v. *Oxman*, 740 F.2d 1298, 1303 (1984), vacated on other grounds, No. 84-1033 (July 2, 1985), aff'd in part, and rev'd in part on other grounds, 774 F.2d 1224 (3d Cir. 1985), cert. denied, No. 85-994 (Mar. 3, 1986); *United States* v. *Henderson*, 717 F.2d 135 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *United States* v. *Leslie*, 759 F.2d 366, 378 (5th Cir. 1985), rev'd on reh'g en banc on other grounds, 783 F.2d 541, 542 n.1 (1986); *United States* v. *Townsend*, 796 F.2d 158, 162-163 (6th Cir. 1986); *United States* v. *Hedman*, 630 F.2d 1184, 1198-1199 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); *United States* v. *Rohrer*, 708 F.2d 429, 432-433 (9th Cir. 1983); *United States* v. *Dennis*, 786 F.2d 1029, 1045-1046 (11th Cir. 1986).

counsel would challenge the credibility of the witnesses on cross-examination. See Pet. App. 3a.

2. Contrary to petitioners' claim, the decision in this case is not in conflict with the decisions of other circuits.

Petitioners first rely on two Ninth Circuit cases—*United States* v. *Roberts*, 618 F.2d 530 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981), and *United States* v. *Brown*, 720 F.2d 1059 (9th Cir. 1983)—to support their claim that the decision in this case is in conflict with the decisions of the Ninth Circuit. In neither *Roberts* nor *Brown*, however, did the Ninth Circuit rule that the truthful testimony provision of a plea agreement is inadmissible on direct examination. In *Roberts*, the Ninth Circuit overturned the conviction because the prosecutor, in his closing argument, improperly vouched for a witness by referring to facts outside the record. See 618 F.2d at 533-534. The court did not base its ruling on the government's introduction of the plea agreement. To be sure, the *Roberts* court suggested that the introduction of a plea agreement might in some contexts constitute improper vouching for the witness's credibility (see *id.* at 536), but the court did not address the question whether the terms of a plea agreement may be admitted to rebut arguments by the defense that the benefits of a plea agreement are likely to have prompted the witness to commit perjury. In subsequent cases, the Ninth Circuit has approved the practice of admitting a witness's plea agreement containing a truthful testimony provision after defense counsel has exploited the plea agreement to challenge the witness's credibility. *United States* v. *Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983); *United States* v. *Tham*, 665 F.2d 855, 861-862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982). From those decisions, it seems clear that the Ninth Circuit would permit the introduction of the truthful testimony provision of a plea agreement, even on direct examination, if, as in this case, defense counsel had clearly signaled that he intended to use the plea agreement to attack the witness's credibility.

The Ninth Circuit's decision in *United States* v. *Brown*, 720 F.2d 1059 (1983), similarly does not support petitioners' claim of conflict. The plea agreements in *Brown* included, in addition to the truthful testimony requirement, a provision whereby the cooperating witnesses agreed to submit to polygraph tests to be administered by the government. The prosecutor emphasized the polygraph provision in arguing that the jury should believe the testimony of the cooperating witnesses, and the court faulted the prosecutor for that reason. See 720 F.2d at 1072-1073. The court expressly noted that it was not addressing the issue, presented in this case, of the admissibility of the truthful testimony requirement in the absence of the polygraph provision (see *id.* at 1074).[2]

This case also is not in conflict with cases from the Second Circuit. That court, unlike most circuits, has held that the government ordinarily may not introduce into evidence the entire plea agreement during the government's direct examination of the cooperating witness; the court has adopted that rule because of its view that until the credibility of the witness has been challenged, the admission of the entire plea agreement "tends unduly to bolster a witness's credibility." *United States* v. *Smith*, 778 F.2d 925, 928 (1986); *United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1145-1147 (2d Cir.), cert. denied, 439 U.S. 913 (1978). The

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[2]Petitioners are plainly wrong in suggesting (Pet. 5-6) that the court of appeals' decision conflicts with decisions of the First and Third Circuits. Both the First and Third Circuits share the Fourth Circuit's view that district courts may admit the truthful testimony provision of a plea agreement on direct examination of a cooperating witness, in anticipation of defense challenges to the witness's credibility. See *United States* v. *McNeill*, 728 F.2d at 14; *United States* v. *Oxman*, 740 F.2d at 1303. The Fifth, Sixth, Seventh, and Eleventh Circuits also share the Fourth Circuit's view. See *United States* v. *Leslie*, 759 F.2d at 378; *United States* v. *Townsend*, 796 F.2d at 162-163; *United States* v. *Hedman*, 630 F.2d at 1198-1199; *United States* v. *Dennis*, 786 F.2d at 1045-1046.

Second Circuit, however, has permitted the government to introduce the witness's plea agreement on direct examination when the defense attacks the credibility of the witness in its opening statement, because in that circumstance it is clear that the defense will use the plea agreement in an effort to impeach the cooperating witness. See *United States* v. *Smith*, 778 F.2d at 928; *United States* v. *Jones*, 763 F.2d 518, 522 (2d Cir. 1985), cert. denied, No. 85-643 (Nov. 12, 1985); *United States* v. *Maniego*, 710 F.2d 24, 27 (2d Cir. 1983). The Fourth Circuit in this case expressly relied on the fact that petitioners' intention to use the plea agreements to impeach the witnesses was already "unmistakable" when the government conducted its direct examination of the three cooperating witnesses (Pet. App. 3a). Hence, the decision in this case is not inconsistent with the analysis in the Second Circuit cases.

Moreover, as the court of appeals found (Pet. App. 3a), petitioners in this case made "extensive" use of the plea agreements in cross-examining the witnesses. The Second Circuit has held that the admission of the entire plea agreement on direct examination is not reversible error where, as in this case, the defense subsequently challenges the credibility of the witness based on the plea agreement in cross-examination. See *United States* v. *Barnes*, 604 F.2d 121, 150-151 (1979), cert. denied, 446 U.S. 907 (1980); *United States* v. *Arroyo-Angulo*, 580 F.2d at 1147. Accordingly, while the Second Circuit has adopted a somewhat more restrictive rule governing the admissibility of plea agreements, that rule would not have resulted in reversal in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

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